

1986

# State of Utah v. Joseph L. Dowells : Brief of Respondent

Utah Court of Appeals

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## Recommended Citation

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**BRIEF**

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DOCKET NO. 860225 IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
	:	
Plaintiff-Respondent	:	Case No. 860225-CA
	:	
vs.	:	
	:	
JOSEPH L. DOWELLS,	:	Priority No. 2
	:	
Respondent/Respondent	:	

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BRIEF OF RESPONDENT

APPEAL FROM CONVICTION OF DISTRIBUTION FOR  
VALUE OF A CONTROLLED SUBSTANCE, A FELONY, IN  
VIOLATION OF UTAH CODE ANN. § 58-37-8 (1986),  
IN THE SECOND JUDICIAL DISTRICT COURT, IN AND  
FOR WEBER COUNTY, STATE OF UTAH, THE  
HONORABLE DAVID E. ROTH, PRESIDING.

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Court of Appeals

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,	:	
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Plaintiff-Respondent	:	Case No. 860225-CA
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IN THE UTAH COURT OF APPEALS

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STATE OF UTAH, :  
Plaintiff-Respondent, : Case No. 860225-CA  
vs. :  
JOSEPH L. DOWELLS, : Priority 2  
Defendant-Appellant. :

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BRIEF OF RESPONDENT

JURISDICTION

This is an appeal from a conviction of a second-degree felony after a trial in the Second Judicial District Court. This court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(e) (1987).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Defendant raised no constitutional or statutory arguments requiring interpretation of any such provisions by this Court.

STATEMENT OF ISSUES PRESENTED ON APPEAL

Whether defendant is entitled to reversal of his conviction due to a witness' in court testimony identifying him when the witness had previously identified a picture of him in an allegedly improperly suggestive photographic line up, and defendant failed to raise the issue prior to or during his trial.

### STATEMENT OF THE CASE

Defendant was charged with distribution for value of a controlled substance, a schedule I narcotic, in violation of Utah Code Ann. § 58-37-8(1)(2)(II) (1986).

Defendant was tried before a jury and was found guilty of distribution of a controlled substance on July 24, 1986, in the Second Judicial District Court, the Honorable David E. Roth, presiding. Defendant was sentenced on the same day to serve a term of not less than one, nor more than fifteen years at the Utah State Prison.

### STATEMENT OF FACTS

On April 7, 1986, Officer Tracy Erickson of the Ogden City Police, Narcotics Department, purchased heroin at 153 30th Street, Ogden (from a man named Joe), as part of a planned operation (R. 55-60). In her report of the operation, Officer Erickson described the man as a black male called "Fats" and "Joe" and approximately five-eleven to six foot one, 185 to 190 pounds, black with gray hair (R. 78-79).

On April 16, Officer Marci Vaughan of the same department showed Officer Erickson some photographs: five "mug shots" of other individuals and a driver's license picture of defendant (R. 90). Although Officer Vaughan made no reference or connection as to the purpose of the display, Officer Erickson recognized the defendant's picture as the man who had sold her heroin at 153 30th Street, Ogden (R. 75-76). At trial, Officer Erickson identified defendant once again, as the man who sold her heroin (R. 58-59).

## SUMMARY OF ARGUMENT

Defendant failed to raise this issue either in a pretrial motion or during his trial. In addition, defendant did not establish a legal argument supported by authority indicating the basis under which this court has authority to review this issue in spite of the prior failure to raise it. Therefore, the issue is precluded from this court's review.

## ARGUMENT

### POINT I

**DEFENDANT'S FAILURE TO MAKE A TIMELY AND PROPER OBJECTION AT TRIAL TO THE PICTURE IDENTIFICATION PROCEDURE PRIOR TO THE TRIAL PRECLUDES HIM FROM RAISING THE ISSUE ON APPEAL.**

Defendant contends that Officer Erickson's in-court identification was tainted by an allegedly improperly suggestive photographic line-up prior to the trial. However, defendant raised no objection at trial as to Officer Erickson's identification testimony nor did he raise the issue on a pre-trial motion.

The Utah Supreme Court has repeatedly stated that failure to object to a witness' testimony before or during trial will prevent the court's review of the issue on appeal. State v. Bagley, 681 P.2d 1242 (Utah 1984) (citing Utah R. Evid. 103(2)(1); State v. Malmrose, 649 P.2d 56, 58 (Utah 1982)).

In State v. Larocco, 665 P.2d 1272 (Utah 1983), the Utah Supreme Court refused to review a claim very similar to the instant one. In that case, the defendant argued that the evidence identifying him as a thief was insufficient, pointing to



the alleged unfair line-ups and arrays of photographs to support his contention. Id. at 1272. The Utah Supreme Court held that since "[n]o objection was made to any such evidence admitted or its insufficiency" the defendant's point on appeal in this respect was not before the court. Id. at 1272. In the instant case, while defendant does not argue directly that the evidence as to his identity was insufficient the argument is implied in his claim that Officer Erickson's testimony raises a reasonable doubt as to his guilt. Therefore, under Larocco, the issue is not properly before this court.

On the other hand, if defendant argues that the credibility of Officer Erickson's testimony raises a reasonable doubt, it is not the function of this court to determine the credibility of witnesses. "The judging of the credibility of the witnesses and the weight of the evidence is exclusively the province of the jury." State v. Wilson, 608 P.2d 1237, 1239 (Utah 1980) (citing State v. Wilson, 565 P.2d 66 (Utah 1977)).

The Utah Supreme Court has previously held that a defendant must move to suppress allegedly suspect identification testimony before trial. Alternatively, he may move to suppress during the trial. State v. McGee, 24 Utah 2d 396, 473 P.2d 388 (Utah 1970). Neither of these procedures was followed by defense counsel. Moreover, defendant did not clearly object to the admission of Officer Erickson's testimony at any point in this proceeding and therefore, defendant's contention that her in-court identification was tainted by her prior exposure to allegedly suggestive photographs is not reviewable by this Court.

In addition to defendant's failure to raise this issue prior to or during trial, this court is precluded from reviewing his claim under State v. Amicone, 689 P.2d 1341 (Utah 1984). Defendant raises a bare claim that he was not proven guilty beyond a reasonable doubt and quotes language from the United States Supreme Court in support. However, defendant fails to properly develop a legal argument as to the case's connection with his claim and fails to establish the basis upon which this Court should review the issue. He makes no claim that the admission of the evidence violates his due process rights as was the case in Simmons v. United States, 390 U.S. 377 (1968), the only case he cited. Interestingly, the Supreme Court granted certiorari to Simmons to consider his claim of denial of due process of law, or at least, his request of reversal of his conviction in the exercise of the court's "supervisory power over the lower federal courts." Id. at 382. While defendant never raised a due process violation claim, his use of Simmons is misguided in that the Simmons decision applies to claims arising from the lower federal courts and is not binding on state courts as long as no due process claims are involved.

Furthermore, defendant ignored the whole body of Utah law derived from Simmons and its progeny in construing his argument. E.g. State v. Wilson, 608 P.2d at 1239 n. 5; State v. Wettstein, 28 Utah 2d 295, 501 P.2d 1084 (1972). Therefore, this Court is precluded from reviewing defendant's claim, which fails to establish a legal argument supported by proper authority.

Finally, the jury was instructed specifically that it must be satisfied of the accuracy of Officer Erickson's identification of defendant beyond a reasonable doubt before they could convict defendant. See Appendix A. They were also instructed generally about using factors such as whether the witness was able to see or hear the things [persons] described and whether she could accurately recall these things [persons]. See Appendix B. This Court can, therefore, find that the jury considered the possible weaknesses in the officer's identification of defendant and rejected them.

CONCLUSION

Based upon the foregoing, Respondent requests this Court to affirm defendant's conviction.

DATED this 2nd day of Sept., 1987.

DAVID L. WILKINSON  
Attorney General

  
SANDRA L. SJOGREN  
Assistant Attorney General

MAILING CERTIFICATE

I hereby certify that on the 2nd day of September, 1987, I caused to be mailed, postage prepaid, four (4) true and exact copies of the above and foregoing Brief of Respondent to Robert L. Froerer, Public Defender Association, 205 26th Street, Suite 13, Ogden, Utah 84401.

  
SANDRA L. SJOGREN  
Assistant Attorney General

## APPENDIX A

INSTRUCTION NO. 10

One of the issues in this case is the identification of the defendant as the perpetrator of the crime. The State has the burden of proving identity beyond a reasonable doubt. You, the jury, must be satisfied beyond a reasonable doubt of the accuracy of the identification of the defendant before you may convict him. If you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime, you must find the defendant not guilty.

## APPENDIX B

You are to determine what witness to believe and what parts of their testimony you believe and what weight or value you place upon the testimony of the various witnesses. In making these determinations, you might like to consider some or all of the following:

- 1) the demeanor and deportment of the witness in the courtroom;
- 2) the witness' interest in the result of the trial;
- 3) any tendency to favor or disfavor one side or the other;
- 4) the probability or improbability of events having occurred the way the witness describes the events;
- 5) was the witness actually able to see or hear or otherwise perceive the things described;
- 6) can this witness now accurately recall the things the witness observed;
- 7) is the witness able to describe what he observed accurately and in a form that you can understand;
- 8) did the witness make earlier statements or expressions which are consistent or inconsistent with what is now being said;
- 9) does the witness speak the truth or not.

But whatever tests you use, the value of a witness' testimony is for you to determine.